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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

EDWARD HAVEN and ALLEN WELBEL.,

Petitioners,

versus

RZECZPOSPOLITA POLSKA, SKARB PANSTWA, State Treasury of Poland, POWSZECHNY ZAKLAD UBEZPIECZEN S.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DO U.S. FEDERAL COURTS HAVE JURISDICTON TO HEAR CONSTIIUTIONAL CLAIMS OF PLAINTIFFS WHOSE CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE POLISH GOVERNMENT IN PROCEEDINGS OF THE FOREIGN CLAIMS AND SETTLEMENT COMMISSION OF THE UNITED STATES (FCSC) WHERE THE POLISH GOVERNMENT DEFRAUDED THE FCSC AND DENIED PETITIONERS DUE PROCESS BY PREVENTING PETIONERS AND OTHER JEWS FROM BRINGING CLAIMS UNDER THE FCSC BY PROHIBITING JEWS FROM OBTAINING THE NECESSARY INFORMATION IN POLAND REQUISITE TO BRING CLAIMS UNDER THE FCSC.

II. DID THE LOWER COURT ERR WHEN IT APPLIED THE INCORRECT AND MUCH MORE BURDENSOME STANDARD REQUIRING THAT PETIONERS CAUSE OF ACTION BE "BASED UPON" THE POLISH GOVERNMENT'S U.S. BUSINESS ACTIVITIES INSTEAD OF APPLYING THE THEORY THAT PETIONERS ACTUALLY PRESENTED THAT REQUIRED A LOWER STANDANRD SHOWING ONLY THAT THE CAUSE OF ACTION WAS "IN CONNECTION WITH" THE U.S. BUSINESS ACTIVITIES OF THE DEFEDNANTS, IN ORDER TO SHOW THAT THE BUSINESS ACTIVITES EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT APPLIED.

III. MAY A LETTER BY THE POLISH GOVERNMENT TO THE DISTRICT COURT IN RESPONSE TO A PENDING MOTION FOR ENTRY OF DEFAULT WHICH SUCCEEDS IN DELAYING THE DISTRICT COURT'S ENTERING AN ORDER OF DEFAULT BE CONSIDERED A RESPONSIVE PLEADING TO SATISFY THE RESPONSIVE PLEADING EXCEPTION TO THE FSIA WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETIONERS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Edward Haven and Allen Welbel v. Rzeczpospolita Polska et al.*, reported at 215 F.3d 727 (2000) is set forth in the appendix hereto (App. 1a)

The Supplement to Memorandum Opinion and Order of the District Court for the Northern District of Illinois, Eastern Division, in *Edward Haven, etc., et al. v. Rzeczpospolita Polska et al.* (10/4/99) reported at 68 F. Supp. 2d 947 is set forth in the Appendix hereto (App. 18a).

The memorandum Opinion and Order of the District Court for the Northern District of Illinois, Eastern Division, in *Edward Haven, etc., et al v. Rzeczpospolita Polska et al.*, (9/29/99) is set forth in the Appendix hereto (App. 23a).

BASIS FOR JURISDICTION

On June 8, 2000, The Circuit Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of this case.

On June 22, 2000, Petitioners timely filed a petition for rehearing en banc and in the alternative a panel re-hearing.

On July 18th, 2000, the Court of Appeals panel denied Petitioners' petition for a panel re-hearing. However, the members of the court en banc did not vote on whether to grant or deny Petitioners' petition for a re-hearing en banc.

This petition for a writ of certiorari is filed within ninety (90) days from the date that the court of appeals panel denied Petitioners' petition for re-hearing.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254.

STATUTORY PROVISIONS INVOLVED

See Appendix.

STATEMENT OF THE CASE

Edward Haven and Allen Welbel are Jews and both emigrated from Poland to the United States after World War II because of anti-Semitism in Poland, recently known to have been caused at the direction of the then Polish government. Both left behind real property owned by their families. Mr. Haven's property was insured by Powszechny Zaklad Ubezpieczen ("PZU"), a Polish insurance company. Mr. Haven's and Mr. Welbel's property were illegally seized by Poland along with the property of hundreds of thousands of Jews and others. PZU failed to honor its insurance contract in regard to Mr. Haven's property. PZU was nationalized by the Polish government after World War II and was a state corporation at the time it refused to honor its obligations to Mr. Haven.

In 1960, the United States entered into an agreement (the Treaty) with the Polish government on behalf of U.S. nationals to compensate U.S. nationals for property illegally seized by the Polish government. The Treaty provided that Poland would pay $40,000,000 to settle claims, if proven to be valid by U.S. nationals, in a manner in which the United States would later determine in accordance with U.S. law alone. The United States assigned the claims arising under the Treaty to the Foreign Claims and Settlement Commission of the United States ("FCSC"). Between 1960 and 1966 the FSCS heard 10, 169 separate disputes between individual plaintiffs against the Polish government. The FCSC ruled in favor of the Polish government in 5,022 cases. In each case, Poland asserted all rights and defenses available to the Polish government under U.S. and international law to deny valid claims to plaintiffs. The total amount asserted by the successful Plaintiffs was $1,143,565,517. The FCSC awarded the successful plaintiffs $151,789,506 in total in principal and interest. The Polish government paid only $40,000,000 that it agreed to under the Treaty.

During the period when Poland was appearing as a party defendant in the FCSC, the Polish government was engaging in anti-Semitic activities, which Polish government officials have only recently acknowledged. These polices included but were not limited to expelling Jews from Poland and refusing Jews the right to return to Poland. While during this period, when other captive nations in central and eastern Europe were undergoing a "springtime" of democratic reforms, the Polish government stood alone in giving rise to anti-Semitic policies by placing Jews in fear for their personal safety and in other ways. While the precipitous rise of anti-Semitism in Poland was widely reported and condemned in the U.S., the degree of Polish government involvement in the anti-Semitism was unclear and denied by the Polish government at the time. The anti-Semitism of the Polish government policies prevented Mr. Haven and Mr. Welbel and thousands of other Jews from obtaining the necessary information in Poland to make claims with the FCSC.

In March of 1999, after becoming aware of the Polish government's role in fomenting anti-Semitism in Poland after WWII, Mr. Haven and Mr. Welbel brought this action in the district court as a class action. The complaint sought damages and the return of real property from the Polish government. The complaint also sought damages from Poland for interfering with PZU's contracts and from PZU for failing to perform its contracts

Mr. Haven and Mr. Welbel served process on the Polish government on May 7th.

On July 8th, the Polish Consulate in Chicago delivered a letter to the district court objecting to Mr. Haven's and Mr. Welbel's service of process. Based on the Consulate's letter, the district court postponed a default hearing for July 12th. The district court later ruled that service of proper was correct. On July 13th, attorneys for the Polish government entered their appearance.

The Polish government and PZU filed motions to dismiss the case on several grounds including lack of subject matter jurisdiction due to sovereign immunity. All parties agree that the defendants are foreign sovereigns under the Foreign Sovereign Immunities Act of 1974. ("FSIA"), 28 U.S.C. sec. 1602 et seq.

The district court ruled only on subject matter jurisdiction and dismissed the case based solely upon lack of subject matter jurisdiction as an exception to sovereign immunity under the FSIA.

The Foreign Sovereign Immunity Act (FSIA), 28 USC secs. 1602-1611, is the exclusive source of subject matter jurisdiction in suits involving foreign states. *Morel de Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir.1984), *cert. denied*, 471 U.S. 1125 (1985). The FSIA is the exclusive means by which foreign countries may be sued in American courts and the sole standard to resolve questions of sovereign immunity raised by foreign states in federal court. *Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 372 (7th Cir. 1985).* A foreign state is immune from the jurisdiction of the federal courts unless at least one of the exceptions under the FSIA applies. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89. (1983).

"The (FSIA) added section 1330 to title 28 of the United States code to provide district courts with both subject matter and personal jurisdiction over nonjury civil actions that involve claims against foreign states that are not entitled to immunity under 28 USC sec. 1605-07 or under *any international agreement.*" *Upton v. Empire of Iran*, 459 F.Supp. 264 (D.D.C. 1978) (emphasis added).

The FSIA provides several exceptions to sovereign immunity. If an exception applies, then the district court has subject matter jurisdiction. Mr. Haven and Mr. Welbel asserted that the district court had subject matter jurisdiction over this action pursuant to four exceptions under the FSIA: 1) the International Agreement exception under 28 USC 1604; 2) the Waiver exception under 28 USC 1605(a)(1); 3)

the Commercial activity exception of clause three under 28 USC 1605(a)(2) and; 4) the International law violation exception of clause two under 28 USC 1605 (a)(3).

REASONS FOR GRANTING THE WRIT

I. UNDER THE TREATY EXCEPTION OF THE FSIA, THE APPELLATE COURT'S OPINION DIRECTLY CONFLICTS WITH U.S. STATUTE 22 U.S.C. 1623 AND WITH THIS COURT AND ALL OTHER FEDERAL CIRCUIT COURTS OF APPEAL INTERPRETING THAT STATUTE, DEFINING THE JURISDICTION OF THE FCSC AND THE SCOPE OF REVIEW THE FEDERAL COURTS HAVE OVER THE FCSC.

The FCSC is a judicial forum under the laws of the United States with jurisdiction over claims "of nationals of the United States against a foreign government." 22 U.S.C. 1623(a). *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981), 22 U.S.C. sec. 1623, 5 U.S.C. sec. 556, 5 U.S.C. sec. 551. The judgements by the FCSC are final and will not be reviewed by the federal courts unless a constitutional issue is raised. *De Vegvar v. Gillilland*, 228 F. 2d 640 (D.C. Cir. 1955). That court held that judicial review would be proper in cases "where a claimant is denied consideration by reason of his race, creed or color." *Id. at* 642. Likewise, courts have routinely found judicial review of FCSC proceedings to be proper under several circumstances. Where a party to a dispute in a FCSC proceeding conducts itself in a fraudulent manner, then judicial review is proper. *DeGaster v. Dillon*, 247 F.Supp. 511 (1963); also, *Schmidt v. Polish Peoples Republic*, 742 F.2d 67 (2nd Cir. 1984) (where the Polish government made partial payment under an FCSS decision, the district court found it had subject matter jurisdiction.). The *De Gaster* court asserted that "the public welfare demands that the agencies of public justice be not so

impotent that they must always be mute and helpless victims of deception and fraud" and that wrongdoers "may not benefit from such fraud." *Id. at* 517.

This Court has repeatedly held that where a U.S. agency or forum like the FCSC is involved, if "Congress intends to preclude judicial review of constitutional claims its intent must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robinson*, 415 U.S. 361, 373-374 (1974); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). In *Webster*, this Court held that this high standard is required "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen* at 681). There is no such intent by Congress to deny judicial review of FCSC judgements when constitutional claims or fraud by a party to the proceedings are involved.

Furthermore, immunity from subject matter jurisdiction is separate from immunity from execution of the property of a sovereign. *Flota v. Motor Vessel*, 335 F.D 619 (4th Cir. 1964). Although a foreign sovereign may attempt to limit its liability to claims by plaintiffs, it cannot limit its immunity from the jurisdiction of U.S. district courts. *Id.*

In the district court, Mr. Haven and Mr. Welbel requested time to show that they were within the Treaty class of claimants. This is a condition precedent to subsequently asserting due process violations under the Treaty and the FCSC judicial process. If Mr. Haven and Mr. Welbel fall within the class of Treaty claimants, then they may proceed to making their case that their constitutional rights were violated by the Polish government when the Polish government frustrated their attempts to procure information regarding their properties in Poland. Since the Polish government prevented Mr. Haven and Mr. Welbel and other Jews from even visiting Poland during the FCSC proceedings to determine the status of the properties and to gather information necessary to bring a claim before the FCSC, the

Polish government succeeded in working a fraud on the FCSC and concealing their participation in that fraud for many years. The Polish government committed this fraud when it was engaged in litigation before the FCSC against the class of Plaintiffs which Mr. Haven and Mr. Welbel sought to represent. The Honorable Stanley J. Glod, who formerly served as Chief Judge of FCSC, submitted an affidavit to the district court in support of Mr. Haven's and Mr. Welbel's argument stating, in part, that inability of claimants to travel to Poland served to frustrate the adjudication of valid claims. (App. 49a-50a). As the court in *De Vegvar* stated, "it is here assumed that, were this an area in which constitutional rights were or might be involved, Congress could not prevent the vindication of such rights in a judicial tribunal." *De Vegvar* at 642. Mr. Haven and Mr. Welbel were denied due process and their day in court because they are Jews. It is a constitutional issue which Mr. Haven and Mr. Welbel have a right to assert in a judicial forum.

However, first Mr. Haven and Mr. Welbel must show that they fall within the Treaty class of plaintiffs. This requires that they show the district court that they were U.S. nationals when there property was seized by the Polish government circa 1945. Also, Mr. Haven and Mr. Welbel would have to show that the Polish government seized the properties illegally, and without compensation to them or to others in their families who may have interests in the properties. Mr. Haven's and Mr. Welbel's request for more time was their first request for an extension of time to produce the necessary records. Their request was incorrectly denied. The district court failed to consider the distinction between waiver of jurisdictional immunity and immunity from execution of property. The district court incorrectly stated, without supporting authorities, that because the terms of the Treaty had attempted to limit the Polish Government's liability to the fund that had since been dispersed, there was no subject matter jurisdiction. (App. 19a). This was error because there may be remedies for plaintiffs like Mr. Haven

and Mr. Welbel. As the *De Gaster* court held, wrongdoers should not benefit from their fraud. *De Gaster v. Dillon* at 517.

The lower court erred in failing to address the issues raised above. The lower court erred by holding in substantive part that the text of the Treaty neither contains any mention of waiver of sovereign immunity nor the availability of a cause of action in the United States, and that the Treaty makes plain that Poland expected the Treaty to eliminate any obligation it had to defend against claims by United States nationals. (App. 8a–11a).

However, the lower court looked to an incorrect part of the Treaty, the Treaty annex, to reach this conclusion. (App. 15a–17a). The Treaty is literally filled with terms and language that explicitly show that Poland knew it was waiving its immunity regarding these claims. *U.S.-Polish Treaty*, 11 UST 1953, Article V, par. C. Under the Treaty, the United States alone retains jurisdiction to determine the manner of deciding the validity of claims against the Polish Government. *U.S.-Polish Treaty*, 11 UST 1953, Article V, par. C. The Polish Government's relinquishment of the right to determine whose claims against it are valid is an express waiver of sovereignty. The specific term "waiver of sovereign immunity" has never been required in order to find a waiver of immunity. Instead, courts have always relied upon whether a Treaty provides a "basis" for a private cause of action. *Frolova v. USSR*, 761 F.2d 370, 373 (7th Cir. 1985). In *Frolova*, the lower court held that "If the parties' intent is clear from the treaty's language courts will not inquire into the remaining factors." *Id.* The language of the Treaty and subsequent acts by the Polish Government make clear that Poland understood that claimants would file claims against Poland in a U.S. forum and that a U.S. forum would decide the validity of claims against Poland.

The Treaty states that the United States government will determine the "validity" of claims against Poland. *U.S.-Polish Treaty*, 11 UST 1953, Article V, par. C. The Treaty

states that the U.S. government will adopt the manner in which to distribute awards to successful claimants. *Id.* at Article III. The Polish Government was the named party defendant in over ten thousand individual cases adjudicated under the Treaty in FCSC proceedings. In each of these cases, the FCSC had authority to require the Polish Government to appear at hearings and conferences. 22 USC sec. 1623 (j), 5 USC sec. 556(c). Indeed, the Polish Government actively participated in the cases against it and was allowed to provide evidence disputing the validity of claims. Id. The FCSC was authorized to apply the law of the Treaty, international law and its own rules in resolving the disputes between claimants and the Polish Government.

The Polish Government at all times retained the status as a party defendant under the law of the FCSC. 5 USC sec. 551.

Clearly under the terms of the Treaty and the standard of *Frolova*, that evident intent of the parties to a treaty governs as to private rights of action, Poland agreed to the jurisdiction of the FCSC regarding U.S. nationals. (The lower court incorrectly used the year 1960, the year the Treaty was signed, as the period by which claimants must have been U.S. nationals to fall within the class of Treaty claimants. Under that incorrect year, both Mr. Haven and Mr. Welbel would certainly have been within the Treaty class of claimants. The correct date stated in the Treaty Annex is the date when the Polish Government seized Appellants' properties. This would be circa 1945 for almost all claimants. However, some properties may have been seized years later.) (App. 8a).

Furthermore, it is clear from nearly identical language in treaties with other nations which the U.S. signed, that the Treaty with Poland was intended to waive jurisdiction and sovereignty as to these claims. Treaties with Yugoslavia and Hungary after WWII use identical terms to grant the FCSC and its forerunners (the functions and duties of the War Claims Commission and the International Claims

Commission were transferred to the FCSC in 1954) subject matter jurisdiction over claims against those countries. *U.S.-Yugoslavia Treaty Settling Claims*, 16 UST 1, *U.S.–Hungary Treaty Settling Claims*, 24 UST 522.

The lower court erred by relying on a facially distinguishable authority, *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989) to support a finding of no waiver under the Treaty. (App. 8a). As this Court observed in that case, the two treaties in issue in *Amereda Hess*, The Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention, provided only substantive rules of conduct for their member states. *Amerada Hess*, at 442. There was no evidence that any of the nations who comply with those multi-lateral treaties ever intended to empower the United States to determine the validity of claims among parties. There was no intent to make the United States the jurisdiction to hear disputes. In the instant case, however, clearly both the Polish Government and the United States understood that the Treaty would provide jurisdiction in a U.S. forum, evidenced by the Polish Government's subsequent appearance in thousands of individual cases.

The implications of the lower court's ruling for the FCSC, if allowed to stand, are enormous. The FSCC and other judicial forums like it would be eviscerated by the lower court's ruling. The FCSC would necessarily be deprived of all subject matter jurisdiction to hear claims that the Executive submits to it. The Executive would be unable to exercise its traditional role of making Treaties with foreign sovereigns to provide a forum to resolve disputes with U.S. nationals. Under the lower Court's ruling, the FCSC would be stripped of subject matter jurisdiction to hear claims against a sovereign party defendant in cases where the foreign sovereign has agreed by Treaty to allow the Executive to authorize the FCSC to hear the dispute.

This Court erred by concluding that Poland expected to eliminate any obligation to "defend" against claims. (App.

8a). Clearly from the text of the Treaty, Poland attempted to limit the extent of its liability in damages, not jurisdiction. *U.S.-Polish Treaty*, Art. I. Indeed under U.S. law, Poland had the identical obligations that every party defendant has in a judicial forum. The Polish government's participation in the FCSC proceedings clearly showed this. The Polish government nowhere denies or explains its participation in the FCSC. The lower court is completely silent as to the long line of above cases and statutes, that are uncontradicted, that show Poland's participation in the FCSC proceedings open up judicial review to constitutional claims raised by Mr. Haven and Mr. Welbel.

Indeed, the district court originally did correctly rule that "the scope of the waiver of Polish sovereign immunity contemplated by the Treaty must be coextensive with the class of claims that were settled by the Treaty." (App. 28a). However, when Plaintiffs showed in a timely manner that they may be within the Treaty class as contemplated by the district court, the district court then erred in reversing itself by dismissing the case for lack of jurisdiction because the FCSC had dispersed the forty million dollars allocated under the Treaty. (App. 19a). The district court in its reversal misapprehended the distinction between the Polish government's attempts to limit its liability under the Treaty with the subject matter jurisdiction which the Treaty confers on the district courts. The lower court similarly fails to address this issue. The district court's order reversing its September 29th, opinion is error and in conflict with *Flota*.

The lower court erred by adopting an overly accommodating posture toward the Polish government unwarranted by the authorities cited or the any policy considerations which may have been made.

The Polish government did not deny the assertions that its prior anti-Semitic policies prejudiced the plaintiffs nor even responded to many of the above authorities.

The Polish government stands alone in central Europe as the only country which has not made provisions for

compensation of the type sought by Mr. Haven and Mr. Welbel. While the other countries of central Europe have already passed legislation beginning the process of compensation, the Polish domestic political environment prevents Poland from addressing these issues in any meaningful way. Recently, the Polish parliament became the only parliament in Europe that passed legislation further alienating and harming the class of plaintiffs by transferring title to their former properties to the current tenants before compensation has been proposed. This legislation, which would have most heavily prejudiced Jews living abroad like Mr. Haven and Mr. Welbel, was correctly vetoed by the Polish President. However, the alarming degree of support in the Polish parliament for this clearly anti-Semitic legislation reveals the impossibility of any meaningful consideration of compensation plans already adopted by neighboring countries.

While the FSIA was intended in part to remove or reduce politics from the judicial process, to the degree that policy considerations may have played a role in the lower court's ruling, it is more reasonable to conclude that the Polish government would gain much from having this case remitted to the district court for further consideration and freeing the reasonable element in the Polish government from what appears to be an intractable problem for the Polish government. As Judge Glod noted, Polish government officials have conspicuously asserted publicly that Poland would indeed abide by the district court's ruling in this matter. (App. 51a).

II. THE COURT OF APPEALS ERRED BY CLEARLY APPLYING THE INCORRECT STANDANRD TO DETERMINE THE COMMERCIAL ACTIVITY OF POLAND IN THE U.S. THAT PLACED AN INSURMOUNTABLE BURDEN ON MR. HAVEN AND MR. WELBEL

The lower court erred by applying the incorrect standard that this Court has repeatedly used to determine whether a foreign sovereign is engaged in commercial activity in the U.S. and therefore whether the commercial activity exception of the FSIA applies. (App. 12a)

This Court has stated repeatedly that there is a difference between a suit based upon commercial activity under the first clause of 1605(a)(2) and one based upon acts performed in connection with such activity under the third clause of that section. *Saudi Arabia v. Nelson*, 113 S.Ct. 1471, 1478, *Argentina v. Weltover*, 112 S.Ct. 2160, 2162-2165.

As is clear from the lower court's opinion, it applied the first clause of 28 U.S.C. sec. 1605 (a)(2) when it stated, "Thus, this lawsuit is not 'based upon' commercial activity in the United States, and the commercial activity exception of the FSIA cannot apply." (App. 12a-13a). The lower court erred by applying the wrong standard without explanation or supporting authority.

Mr. Haven and Mr. Welbel sought jurisdiction only under the third clause of section 1605(a)(2). This clear error by the lower court places it in conflict with this Court in *Saudi Arabia v. Nelson* and *Argentina v. Weltover*. The prejudice to Mr. Haven and Mr. Welbel is clear and defeats an otherwise meritorious claim under *Saudi Arabia v. Nelson* and *Argentina v. Weltover*. By requiring Mr. Haven and Mr. Welbel to show that the cause of action was "based upon" commercial activity carried on in the U.S., the lower court applied a standard which is much higher and more difficult to meet than the third clause of section 1605(a)(2).

The third clause of section 1605(a)(2) requires only that the foreign act that causes a "direct effect" in the U.S. occur "in connection with" a foreign sovereign's commercial activity, not that there is a "based upon" relationship. 28 USC sec. 1605(a)(2).

The acts by PZU which form the basis of Appellants' cause of action is PZU's failure to pay out on insurance policies as a result of the Polish Government's anti-Semitic policies. PZU was the alter ego of, and owned entirely by, the Polish Government. PZU's failure to pay Jews on property insurance policies created a windfall profit for PZU. Appellants respectfully submit that PZU's marketing of a variety of insurance policies was made feasible by, and is the direct effect of, PZU's failure to pay on its property insurance policies to Jews. Appellants' cause of action, a failure to pay insurance policies, is "connected" with PZU's ongoing insurance business. Therefore, there is subject matter jurisdiction over PZU under the commercial activities exception to the FSIA.

III. THE COURT OF APPEALS ERRED BY FAILING TO APPLY THE DISTRICT COURT CASE *HIRSH V. ISRAEL AND GERMANY* TO THE ISSUES PRESENTED BY MR. HAVEN AND MR. WELBEL DEPRIVING MR. HAVEN AND MR. WELBEL OF APPELLATE REVIEW REGARDING THE RESPONSIVE PLEADING EXCEPTION TO SOVEREIGN IMMUNITY.

This lower court ruled that the letter by the Polish Consulate to the district court was a motion and not a responsive pleading, and therefore was not a waiver of sovereign immunity. (App. 6a-7a).

The lower court's discussion and analysis show that the lower court did not consider whether the Consulate's letter would constitute a responsive pleading in regards to the pending motion for entry of default as opposed to a response pleading in regard to the complaint. Id.

The Court relied upon *Hirsh v. Israel and Germany* to conclude that a letter by a consulate to a district court is not a responsive pleading. *Hirsh v. Israel and Germany*, 962 F.Supp. 377 (S.D.N.Y. 1997). However, the *Hirsh* case is distinguishable from the present case because in *Hirsh* no motion for default was pending at the time the German Consulate sent the letter to the district court, the German Consulate explicitly stated that the letter was not an appearance, and the German Government was not actually in default.

In the present case, the Polish government acknowledged in a sworn affidavit that the Polish Consulate was notified that there was a motion for entry of default before the Consulate wrote the letter to the district court. Affidavits by Ms. Dobecka and Ms. Machnik. Considering the facts in the light most favorable to Mr. Haven and Mr. Welbel, the lower court should have concluded that the Polish Consulate sent the letter to the district court in response to the motion for entry of default, which Mr. Haven and Mr. Welbel were entitled to as a matter of law at that time. The lower court considered only that the Polish Consulate's letter was a responsive pleading in regards to the complaint and not in regards to Mr. Haven's and Mr. Welbel's motion for entry of default. (App. 4a-6a).

The Polish Consul's letter is a conscious and affirmative step into the district court in order to seek relief from an entry of default which the district court would have granted but for the Polish Consul's letter.

Two Polish Consulate employees stated to the district court that they telephoned Appellants' counsel on more than one occasion and spoke to him regarding the present case. Affidavits of Ms. Dobecka and Ms. Machnik. Counsel for Appellants did not initiate the phone calls with the Polish Consulate. As is clear from the affidavits, sovereign immunity was not discussed. Appellants have not argued in the district court nor in the lower court that any telephone calls constituted a waiver of sovereign immunity. Mr. Haven

and Mr. Welbel raised the issue of the telephone calls initiated by the Polish Consulate only to show that the Polish Consulate, at no time, made any effort to reserve immunity prior to their subsequent letter to the district court.

Rule 7 of the FRCP states in relevant part:

> (b) Motions and other papers.
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

The above section requires only that a motion contain an application for an order from the court or other relief and a written notice of hearing. Appellants had a motion for entry of default pending. The Polish Consulate's attorney acknowledges by affidavit that she had notice of that motion. Therefore, Appellants complied with the above section. The Polish Consulate however, sent their letter ex parte and failed to request any relief or order from the Court. In the light most favorable to Mr. Haven and Mr. Welbel, the Polish Consulate's letter is distinguishable from the German Consulate's letter in *Hirsh*, and is indeed a response to the motion for entry of default. Therefore the Polish Government did submit a responsive pleading without reserving sovereign immunity.

CONCLUSION

For all of the above stated reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit and ultimately to vacate and reverse the district court's order of dismissal and remand this matter to the district court for further consideration.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 99-3823

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EDWARD HAVEN and ALLEN WELBEL,
Plaintiffs-Appellants,

v.

RZECZPOSPOLITA POLSKA, SKARB PANSTWA, State Treasury of Poland, POWSZECHNY ZAKLAD UBEZPIECZEN S.A.,
Defendants-Appellees.

April 6, 2000, Argued

June 8, 2000, Decided

OPINION:

RIPPLE, *Circuit Judge*. Edward Haven and Allen Welbel brought this action seeking the return of property allegedly belonging to them and their families. They claim that the property was seized by the Polish government after World War II. The district court dismissed the action on the ground that it lacked subject matter jurisdiction. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

BACKGROUND [1]

Edward Haven and Allen Welbel both emigrated from Poland to the United States after World War II because of the Polish government's anti-Semitic policies. Both of them left behind real property owned by their families. Mr. Haven's property was insured by Powszechny Zaklad Ubezpieczen ("PZU"), a Polish insurance company. Mr. Haven and Mr. Welbel allege that their family lands were illegally seized by the state, and Mr. Haven also alleges that PZU failed to honor its insurance contract. PZU itself was nationalized by Poland after World War II.

In 1960, Poland and the United States entered into a treaty by which Poland agreed to compensate United States nationals for property seized by Poland after World War II (the "Treaty"). The Treaty provided that Poland would pay $ 40,000,000 in full settlement of all claims made by nationals of the United States. The United States set up an administrative procedure by which its nationals could obtain a portion of the settlement.

In March 1999, Mr. Haven and Mr. Welbel brought this action in the district court.[2] The complaint sought the return of property and damages from the Republic of Poland and the State Treasury of the Republic of Poland (collectively "Poland"). It also sought damages from Poland for interfering with PZU's contracts and from PZU for failing to perform its contracts. Mr. Haven and Mr. Welbel served process on the Polish government on May 7. On July 8, the Polish Consulate in Chicago delivered a letter to the district court, purporting to express the Polish Ministry of Justice's view that service was improper under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"). The district court postponed a default hearing scheduled for July 12, and on July 13 counsel for Poland and PZU entered an appearance.

On August 10, Poland and PZU filed a motion to dismiss the case on several grounds, including lack of subject matter

jurisdiction due to sovereign immunity. There is no dispute that all of the defendants in this case are "foreign states" within the meaning of the 1976 Foreign Sovereign Immunity Act ("FSIA"), *28 U.S.C. sec. 1602* et seq. The district court entered an order on August 24 holding that the FSIA could be applied retroactively to claims arising before its passage. On September 29, the district court ruled that it lacked subject matter jurisdiction because the action did not fall within any of the exceptions to the general rule that foreign sovereigns are immune from suit in United States courts. First, the court held that the Polish Consulate's July 8 letter was not a knowing relinquishment of rights that waived sovereign immunity.[3] Second, it held that the Treaty had not expressly waived sovereign immunity.[4] Third and finally, the district court found that PZU had not waived its sovereign immunity by undertaking commercial activity in the United States.

II

DISCUSSION –

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *See Fedorca v. Perryman, 197 F.3d 236, 239 (7th Cir. 1999); Kaplan v. United States, 133 F.3d 469, 472-73 (7th Cir. 1998).* Foreign sovereigns historically enjoyed immunity from common law suit in United States courts. *See In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932, 945-46 (7th Cir. 1996); Goar v. Compania Peruana de Vapores, 688 F.2d 417, 425-26 (5th Cir. 1982).* The FSIA provides a statutory codification of that immunity. *See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983); Employers Ins. of Wausau v. Banco De Seguros Del Estado, 199 F.3d 937, 941 (7th Cir. 1999); Wolf v. Federal Republic of Germany, 95 F.3d 536, 540-41 (7th Cir. 1996).* The FSIA also provides exceptions to the rule of sovereign immunity. *See Verlinden, 461 U.S. at 488; Wolf, 95 F.3d at 541.*

Because those exceptions are in derogation of the common law, we must not read them broadly. Statutes in derogation of the common law are narrowly construed. *See Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35, 78 L. Ed. 2d 29, 104 S. Ct. 304 (1983); In re Liberatore, 574 F.2d 78, 85 (2d Cir. 1978); Picker v. Searcher's Detective Agency, 169 U.S. App. D.C. 345, 515 F.2d 1316, 1319 (D.C. Cir. 1975).*

A.

Mr. Haven's and Mr. Welbel's first argument that jurisdiction is appropriate relies on the letter mailed to the district court by the Polish Consulate. Mr. Haven and Mr. Welbel contend that this letter brings Poland within an exception to sovereign immunity:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

28 U.S.C. sec. 1605(a)(1). If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived. *See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985)* (per curiam); *accord Drexel Burnham Lambert v. Committee of Receivers, 12 F.3d 317, 326 (2d Cir. 1993); United States v. Crawford Enters., 643 F. Supp. 370, 378-79 (S.D. Tex. 1986).* The letter sent by the Polish Consulate to the district court did not raise any sovereign immunity defense; therefore, if the letter was a responsive pleading, sovereign

immunity has been waived. Mr. Haven and Mr. Welbel argue that the letter was a responsive pleading.

Rule 7 of the Federal Rules of Civil Procedure explains that only certain filings may be considered responsive pleadings, including a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. "No other pleading shall be allowed." Fed. R. Civ. P. 7. A responsive pleading need only be filed after proper service has been made. *See Silva v. City of Madison, 69 F.3d 1368, 1376 (7th Cir. 1995)* ("[A] responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts."); *Bowman v. Weeks Marine, Inc., 936 F. Supp. 329, 336-37 (D.S.C. 1996).*

Although objections to service of process may be made in a responsive pleading, they may also be made through a Rule 12 motion to dismiss. As Rule 12(b) explains:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, *except that the following defenses may at the option of the pleader be made by motion:* . . . (5) insufficiency of service of process.

Fed. R. Civ. P. 12 (emphasis added). We have acknowledged that the insufficiency of service of process may properly be raised through a motion to dismiss. *See, e.g., Troxell v. Fedders of North Am., Inc., 160 F.3d 381, 382-83 (7th Cir. 1998)* (affirming district court's grant of defendant's "motion to dismiss" for insufficient process). A motion to dismiss is not a responsive pleading. *See Duda v. Board of Educ. of Franklin Park, 133 F.3d 1054, 1056-57 & n.2 (7th Cir. 1998); Camp v. Gregory, 67 F.3d 1286, 1289 (7th Cir.*

1995); Scam Instrument Corp. v. Control Data Assoc., 458 F.2d 885, 889 (7th Cir. 1972).[5]

The Federal Rules of Civil Procedure also specifically contemplate that foreign sovereigns will be allowed to object to the adequacy of service. Rule 4, which governs service of process, requires that service on foreign sovereigns comply with *28 U.S.C. sec. 1608.* See Fed. R. Civ. P. 4(j)(1). The Hague Convention itself is attached to Rule 4 as an appendix. Article 4 of the Convention allows foreign sovereigns to object to the service of process. [6]

The Federal Rules of Civil Procedure, and our case law interpreting those rules, require us to hold that sovereign immunity was not waived by the Polish Consulate's letter. The only court filing that can waive a sovereign immunity defense is a responsive pleading that does not raise the defense. The Consulate's letter objecting to the propriety of service is properly treated as a motion to dismiss, not a responsive pleading. *See Hirsh v. State of Israel, 962 F. Supp. 377, 380* (S.D.N.Y.) ("Although an implied waiver may be found where a foreign state files a responsive pleading that fails to raise the defense of sovereign immunity, Germany's letter is not a 'responsive pleading.'" (citation omitted)), *aff'd, 133 F.3d 907 (2d Cir. 1997).*[7] Indeed, until it was established that service of process had been properly executed, Poland was under no obligation to file any responsive pleading. *See Silva, 69 F.3d at 1368.* Because the letter was not a responsive pleading, its failure to raise the sovereign immunity defense did not compromise Poland's ability to raise that defense.

Our holding that Poland's letter objecting to service of process did not waive sovereign immunity is consistent with Congress' requirement that waiver on the part of foreign sovereigns be knowing. We have written:

> Congress anticipated, at a minimum, that waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so. The case law evidences a reticence to find a waiver from the nature of a foreign state's participation in litigation.

Frolova, 761 F.2d at 378. Poland's objection to the adequacy of service was not "a conscious decision to take part in the litigation"; indeed, it was an indication by Poland that, at that point, it did not intend to participate in the litigation. Thus, Poland's letter objecting to the service of process should not waive its sovereign immunity.

We also cannot agree with Mr. Haven's and Mr. Welbel's contention that their counsel's phone conversations with employees of the Polish Consulate led to a waiver of Poland's sovereign immunity. Counsel for Mr. Haven and Mr. Welbel telephoned the Polish Consulate, and counsel claims that two Polish Consulate employees spoke to him without raising the sovereign immunity defense. Mr. Haven and Mr. Welbel argue that the district court improperly ruled that the employees did not have the authority to waive sovereign immunity. The district court found there was nothing to suggest that those employees had the authority to waive Poland's sovereign immunity. Even if those employees did have the authority to waive sovereign immunity, they could not do so in a telephone conversation. A telephone conversation is not a responsive pleading. Thus, we decline to find waiver from any communications between counsel and the Consulate.

B.

Mr. Haven and Mr. Welbel next argue that the district court had jurisdiction because the Treaty waived Poland's

sovereign immunity. The district court initially assumed that Mr. Haven and Mr. Welbel were not United States nationals in 1960 when the Treaty was signed; it ruled that, even if the Treaty did waive Poland's sovereign immunity, it could do so only as to persons who were United States nationals in 1960. After the district court ruled, Mr. Haven and Mr. Welbel sought leave to establish that they were, in fact, United States nationals at the time of the Treaty. The district court then determined that, if they were United States nationals at the time of the Treaty, the Treaty itself would foreclose their claim. Because we believe that nothing in the Treaty contemplates a waiver of Poland's sovereign immunity, we need not determine whether Mr. Haven and Mr. Welbel were United States nationals in 1960.

1.

The text of the Treaty contains no mention of any waiver of sovereign immunity. It does not even mention the availability of a cause of action in the United States courts. There is therefore no basis for finding that the Treaty waived Poland's sovereign immunity. A foreign sovereign does not waive its sovereign immunity "by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442-43, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989); see also Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 123 (D.C. Cir. 1999); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 245-46 (2d Cir. 1997).*

Even if Mr. Haven and Mr. Welbel had been United States nationals in 1960, the Treaty could not be said to waive Poland's sovereign immunity. Indeed, the text of the Treaty makes plain that Poland expected the Treaty to eliminate any obligation it had to defend against claims by United States nationals for nationalized property. The

President of the United States has the authority to renounce or extinguish claims of United States nationals against foreign governments in exchange for lump-sum payments. *See Dames & Moore v. Regan, 453 U.S. 654, 679, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981); Belk v. United States, 858 F.2d 706, 709 (Fed. Cir. 1988).* The Treaty is an example of an agreement between the United States and a foreign sovereign that extinguishes all claims by United States nationals. *See Dames & Moore, 453 U.S. at 680 n.9; see also Schmidt v. Polish People's Republic, 742 F.2d 67, 72 (2d Cir. 1984).* The text of the Treaty is clear. Article I describes the lump sum payment made by Poland to the United States as a "full settlement and discharge of all claims of nationals of the United States." *11 U.S.T. 1953* at Art. I. That lump sum was to be distributed "in accordance with such methods of distribution as may be adopted by the Government of the United States." *Id.* at Art. III. Thus, by the terms of Articles I and III, the United States replaced Poland as the country responsible for ensuring that proper compensation was made to United States nationals who owned land nationalized by Poland.[8] The language of the Treaty makes explicit that Poland expected the lump-sum payment to satisfy fully its duties to United States nationals. It would be futile, therefore, to allow Mr. Haven and Mr. Welbel to prove that they were United States nationals in 1960 because the 1960 Treaty did not waive Poland's sovereign immunity against United States nationals.

2.

Mr. Haven and Mr. Welbel argue, however, that, although the text of the Treaty does not waive explicitly Poland's sovereign immunity, the language nevertheless permits the invocation of various exceptions to sovereign immunity. As we explain in the following paragraphs, however, these exceptions are not applicable.

Mr. Haven and Mr. Welbel submit that the Treaty has waived sovereign immunity by designating that American law would govern any contractual disputes. At the outset, we note that no such clause exists in this treaty. The portion of the Treaty's annex cited by Mr. Haven and Mr. Welbel is a discussion of what persons may seek recompense under the Treaty; it does not provide that United States law would govern any contractual disputes. See Treaty Annex A(b)-A(d) & B. n9 Moreover, although a sovereign may waive implicitly its immunity through a contract if the contract "stipulates that American law should govern any contractual disputes," *Frolova, 761 F.2d at 377,* courts have required a more explicit waiver in the case of treaties, *see id. at 378* ("Waiver by treaty is not included in the list of examples of implicit waivers.").

Mr. Haven and Mr. Welbel also contend that, through the language of the Treaty, Poland sought assistance from the United States in protecting against claims asserted through other countries. Article V of the Treaty states that the United States would provide to Poland copies of any formal statements of claim. *See* Treaty at V.B. This provision ensured that, once a United States national was compensated through the Treaty, Poland would have a record of that national's claim being satisfied in order to prevent that national from asserting another claim through the government of another nation. Poland's request for information about claims filed in the United States does not make Poland amenable to suit in United States courts or expressly waive its sovereign immunity in those courts. Therefore, we conclude that Article V does not waive Poland's sovereign immunity.

In summary, we are not persuaded that the text of the Treaty has waived Poland's sovereign immunity. "Courts have generally required convincing evidence that a treaty was intended to waive sovereign immunity before holding that a foreign state may be sued in this country." *Frolova, 761 F.2d*

at 378. There is nothing in this Treaty to suggest that Poland ever intended to waive its immunity to suit in United States courts under any circumstances. The text of the Treaty does not waive Poland's sovereign immunity, regardless whether Mr. Haven and Mr. Welbel were United States citizens in 1960.

3.

When a sovereign has protected its immunity through the language of a treaty, it may nonetheless waive that immunity by its actions in United States courts. If a foreign nation brings an action in a United States court against a United States citizen, it may waive its immunity from suit by that individual. *See Siderman v. Republic of Argentina, 965 F.2d 699, 722 (9th Cir. 1992)* ("The evidence indicates that Argentina deliberately involved United States courts in its efforts to persecute Jose Siderman. If Argentina has engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to that redress."). There is no allegation that Poland ever "deliberately involved United States courts" in any matter involving either Mr. Haven or Mr. Welbel. Thus, Poland has not waived its sovereign immunity by any action relating to the Treaty.

C.

Mr. Haven and Mr. Welbel's final argument that the district court had subject matter jurisdiction is based on the FSIA's commercial activity exception. A foreign sovereign may waive sovereign immunity by carrying on commercial activity in the United States. The FSIA permits jurisdiction in any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

> elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. sec. 1605(a)(2). This subsection requires that the lawsuit itself must be "based upon" the commercial activity that supports a waiver of sovereign immunity. *See Saudi Arabia v. Nelson, 507 U.S. 349, 358, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993); Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991)* ("This Court and most others have stated that the term 'based upon' requires an 'identifiable nexus' between the claim and the commercial activity at issue."); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 582 (7th Cir. 1989).* The Fifth Circuit has explained that "there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 386 (5th Cir. 1991); see also Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 389 (5th Cir. 1999)* (quoting *Stena Rederi*); *In re Tamimi, 176 F.3d 274, 280 (4th Cir. 1999)* (same).

The commercial activities alleged by Mr. Haven and Mr. Welbel are internet advertisements for insurance marketed by PZU and efforts by PZU to market insurance to United States consumers. Assuming without deciding that the alleged activities constitute commercial activity in the United States, these activities bear no relation to the claims raised by Mr. Haven and Mr. Welbel. Any current efforts by PZU to market insurance in the United States have no relationship to PZU's role in the nationalization of property in Poland after World War II. Thus, this lawsuit is not "based upon" commercial

activity in the United States, and the commercial activity exception of the FSIA cannot apply.

Conclusion

For the foregoing reasons, [10] the judgment of the district court is affirmed.

AFFIRMED

Footnotes

[1] When reviewing a dismissal for lack of subject matter jurisdiction, we assume the truth of the plaintiffs' factual allegations and consider those allegations in the light most favorable to the plaintiffs. *See Komorowski v. Townline Mini-Mart & Restaurant, 162 F.3d 962, 964 (7th Cir. 1998)* (per curiam).

[2] Mr. Haven and Mr. Welbel sought appointment as representatives of a class. The district court never reached the issue of class certification.

[3] The court also held that Poland's objection to the service of process was erroneous, and that process had properly been served on Poland.

[4] The district court's order assumed that Mr. Haven and Mr. Welbel were not United States nationals at the time of the Treaty, and thus outside the Treaty's scope. After Mr. Haven and Mr. Welbel filed supplemental materials with the court stating that they may have been United States nationals in 1960, the district court issued an October 4 supplemental order, finding that if they were United States nationals in 1960, their claims were foreclosed by the Treaty itself.

[5] *Accord Bowden v. United States, 336 U.S. App. D.C. 126, 176 F.3d 552, 555 (D.C. Cir. 1999); United States ex rel. Saaf v. Lehman Bros., 123 F.3d 1307, 1308 (9th Cir. 1997)* (per curiam); *Barbara v. New York Stock Exch., Inc., 99 F.3d 49, 56 (2d Cir. 1996); Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1131 (10th Cir. 1994).*

[6] Normally, the objection must be made by the Central Authority of the foreign sovereign, which informs the applicant of its objections. *See* Hague Convention at Art. 4. In this case we are not asked to decide whether Poland followed the correct procedure under the Hague Convention in its objection to service, only whether Poland's objection to the service of process was in the form of a responsive pleading.

[7] Mr. Haven and Mr. Welbel seek to distinguish *Hirsh* on the ground that in that case, Germany's letter to the court expressly reserved its sovereign immunity defense, unlike Poland's letter here. Although the court in *Hirsh* noted language in Germany's letter reserving a sovereign immunity defense, the court actually relied on the fact that the letter itself was not a responsive pleading. See *Hirsh, 962 F. Supp. at 380.*

[8] The United States fulfilled, through the Foreign Claims Settlement Commission (the "FCSC"), its obligation to make whole its nationals who owned land seized by Poland. The FCSC has jurisdiction to adjudicate claims brought by any United States national arising under:

> the terms of any claims agreement concluded on or after March 10, 1954, between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof.

22 U.S.C. sec. 1623(a)(1)(B). The FCSC disbursed the funds obtained from Poland in the Treaty. *See Schmidt, 742 F.2d at 69* (discussing claims for recompense under the Treaty filed with the FCSC). The FCSC completed its administration of the Polish Claims Program in 1966. *See* Foreign Claims Settlement Comm'n, Twenty-Fourth Semiannual Report to the Congress 37 (1996). FCSC decisions may not be reviewed by a federal court. See *22 U.S.C. sec. 1622g.*

[9] The portion of the Treaty Annex cited by Mr. Haven and Mr. Welbel reads, in full:

> A. For the purpose of distribution by the Government of the United States of the sum to be paid by the Government of Poland, "claims of nationals of the United States" are rights and interests in and with respect to property nationalized, appropriated or otherwise taken by Poland which, from the date of such

nationalization, appropriation or other taking to the date of entry into force of this Agreement, have been continuously owned, subject to the provisions of paragraphs B and C of this Annex,

. . . .

(b) directly by juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof, of which fifty per cent or more of the outstanding capital stock or proprietary interest was owned by nationals of the United States;

(c) directly by juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof, of which fifty per cent or more of the outstanding capital stock or proprietary interest was owned by natural persons who were nationals of the United States, directly, or indirectly through interests in one or more juridical persons of any nationality;

(d) indirectly by natural persons who were nationals of the United States or by juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof, through interests in juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof which are not included within category (b) or (c) above[.]

. . . .

> B. Juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof which have been reorganized through judicial proceedings after their property or rights and interests in and with respect to property were nationalized or taken by Poland shall participate in the sum to be paid by the Government of Poland only to the extent that the outstanding capital stock or proprietary interest in such juridical persons was owned, at the time of such nationalization or other taking, by natural persons who were nationals of the United States, directly, or indirectly through interests in one or more juridical persons organized under the laws of the United States or of a constituent State or other political entity thereof.

11 U.S.T. 1953 Annex, at A(b)-A(d) & B.

[10] Because the district court lacked jurisdiction over this matter, we need not consider the alternate grounds for dismissal argued by Poland.

No. 99 C 1727

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EDWARD HAVEN, etc., et al.,
Plaintiffs,

v.

RZECZPOSPOLITA POLSKA (Republic of Poland), et al.,
Defendants.

October 4, 1999, Decided

October 4, 1999, Date Opinion Filed

OPINION:

SUPPLEMENT TO MEMORANDUM OPINION AND ORDER

This Court's September 29, 1999 memorandum opinion and order ("Opinion"[1]) dismissed this action for lack of subject matter jurisdiction, having explained in detail why the conduct ascribed by the Complaint to the four defendants--Poland, Treasury, Warta and PZU--does not come within any of the exceptions to sovereign immunity specified in the Foreign Sovereign Immunities Act ("Act"). Counsel for plaintiffs immediately filed a Motion To Reconsider and Vacate the Court's Order To Dismiss the Case ("Motion"), pointing out correctly that an earlier minute order had provided for plaintiffs' opportunity to submit some supplemental factual materials on September 30--after the September 26 due date of defendants' final brief on the

motions to dismiss. [2] But because those supplemental materials (referred to here by the same Exhibit designations that are contained in plaintiffs' new filing) plainly afford plaintiffs no substantive help,[3] this supplement to the Opinion will address them in the brief compass needed to show why that is so.

To begin with, Exs. B and C reflect (1) that the predecessor in interest of name plaintiff Evelyn Ruebner was a United States national when his property was confiscated by Nazi Germany (not by Poland, although the part of Germany where the property was located became part of Poland after World War II, and the property was assertedly nationalized by Poland in 1946 or thereafter) and (2) that the predecessor in interest of the first name plaintiff (Edward Haven) might also have been a United States national at the time of expropriation of the predecessor's property. But it takes only a moment to see that counsel has totally missed the point in those terms.

That is so because this Court has not, as Motion at 2 says, "found that none of the Plaintiffs' claims were settled by the Treaty of 1960 because none of the Plaintiffs were U.S. nationals when Poland expropriated their property." Instead Opinion at 9 had simply assumed that to be the case because that was the tenor of the parties' submissions at that stage--but even more importantly, because of the tautology that if any plaintiff or his or her predecessor was indeed within the scope of the Treaty, the claim of that plaintiff would be barred by the Treaty's express terms. So all that need be said on that score is that if and to the extent that the Treaty is applicable rather than inapplicable to any plaintiff, that plaintiff's claim is dead in the water to begin with.[4]

Next, Ex. D is an affidavit from an American lawyer, the former Chairman and Chief Judge of the Foreign Claims Settlement Commission of the United States in which he states, as Motion at 3 puts it, that during his tenure in that

capacity "he believed that the types of claims that form the basis of the instant action were legitimate." That may well be so (see this Court's expressions on that subject in Opinion at 21-23), but it is of course totally irrelevant to the subject matter jurisdictional issue that binds this Court and that has compelled dismissal. And to the extent that the lawyer's affidavit also seeks to leap from the notion that Polish Consulates in the United States have engaged "in the protection of the rights of Polish national heirs, beneficiaries and legatees, in estate cases filed in probate courts in the U.S." to the conclusion that "by extension, one could well assume that such consuls in reality do represent and speak for the Government of Poland in all matters relating to legal issues" (emphasis in the affidavit itself), that is a total nonsequitur when it comes to the question of any claimed waiver, by any Polish consular people, of the sovereign immunity of the Polish government itself. [5]

All of the remaining exhibits (Exs. E, F and G) offer absurd notions of what amounts to doing business in the United States--whether purported activity by Treasury and PZU in assertedly attempting to block a merger in Poland of a Polish bank that maintains a representative office in New York, or an affidavit in the English language that PZU maintains on the Internet (describing its Polish insurance activities), or a 50-50 joint venture agreement between Warta and a Polish subsidiary of Citibank to set up a pension fund in Poland. Those contentions are so outre as to disqualify them from being dignified by the label of "legal arguments."

Finally, plaintiffs' counsel again misses the point entirely in stating (Motion at 4):

> The Court ruled that it cannot act because of limits on equitable remedies as relating to foreign sovereignty. The Plaintiffs requested damages from defendants as well as equity.

This Court may grant remedies at law as to foreign sovereigns.

Everything said in the Opinion was of course addressed to the impermissibility of advancing any claims against defendants because of sovereign immunity--and any claims would of course extend to those labeled "at law" as well as "in equity." What Opinion at 22-23 went on to state is simply the added point that no general notions of equitable jurisprudence could override that immunity either.

In sum, nothing in plaintiffs' most recent submission makes a particle of difference in the analysis or the conclusions set out in the Opinion. Plaintiffs' motion for reconsideration and for vacation of the September 29 dismissal is denied.

Milton I. Shadur

Senior United States District Judge

Date: October 4, 1999

Footnotes

[1] All terms defined in the Opinion will be referred to in the same way here, without any need for redefinition.

[2] Needless to say, plaintiffs' counsel is entitled to an apology for that oversight. This Court's in-chambers recordkeeping system had inadvertently recorded only the briefing timetable, thus having failed to pick up on the added provision permitting plaintiffs' submission of supplemental factual materials.

[3] It was implicit in the Opinion's analysis, and is equally implicit here, that this Court's consideration of defendants' Fed. R. Civ. P. ("Rule") 12(b)(1) motions to dismiss for lack of subject matter jurisdiction--unlike its role in ruling on a Rule 12(b)(6) motion--is not constrained by the boundaries of the Complaint's allegations (see, e.g., *Calderon v. United States, 123 F.3d 947, 951 n.2 (7th Cir. 1997);* and see generally 2 James W. Moore et al., Moore's Federal Practice P12.30[3] and [4] (Milton I. Shadur, author)(3d ed. 1998)). Because this supplement (like the Opinion) does draw on factual information tendered by the parties outside of the Complaint, it may be worth making that implicit proposition explicit for the sake of both clarity and completeness.

[4] What the Opinion addressed was plaintiffs' very different argument about the scope and effect of the Treaty on claimants who were not within its terms. That totally groundless argument has been scotched by Opinion at 8-10.

[5] In that regard, Opinion at 12-14 has already identified the total unpersuasiveness of the arguments by plaintiffs' counsel regarding waiver--either express or implied--by the actual conduct ascribed to persons affiliated with the Polish Consulate.

No. 99 C 1727

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EDWARD HAVEN, etc., et al.,
Plaintiffs,

v.

RZECZPOSPOLITA POLSKA (Republic of Poland), et al.,
Defendants.

September 29, 1999, Decided

September 29, 1999, Date Opinion Filed

OPINION:

MEMORANDUM OPINION AND ORDER

Four name plaintiffs--Edward Haven as representative of the Estate of Maksymilian Rechtszafen, Evelyn Ruebner as representative of the Estate of Herbert Prerauer, Allen Welbel and Mark Krug--have brought this putative class action against Rzeczpospolita Polska ("Poland") and Skarb Panstwa, Rzeczpospolita Polska (the State Treasury of Poland, referred to here simply as "Treasury"), charging (1) their wrongful seizure and expropriation of real property owned by plaintiffs or their predecessors and by other Jewish property owners

during and shortly after World War II and (2) their interference with and prevention of the performance of insurance contracts between plaintiffs and other class-member property owners on the one hand and insurers Warta S.A. ("Warta") and Powszechny Zaklad Ubezpieczen S.A. ("PZU") on the other. Plaintiffs have also sued Warta and PZU for breach of those property and life insurance contracts.

From the time of their first appearances in this court, all defendants have moved for dismissal for, among other things, a claimed lack of federal subject matter jurisdiction due to foreign sovereign immunity. Because the very nature of a jurisdictional challenge calls for no more than a surface examination (without substantive evaluation) of the abhorrent conduct alleged in the First Amended Class Action Complaint ("Complaint"), this opinion will sketch out those allegations and then turn to the relevant legal analysis. And because that analysis discloses that this court does indeed lack subject matter jurisdiction under the Foreign Sovereign Immunities Act ("Act," *28 U.S.C. § § 1330,* 1602-1611[1]), this action must be and is dismissed.[2]

Background

Everyone agrees that the four defendants are "foreign states" or "agencies or instrumentalities of foreign states" under the Act: Poland and its Treasury (collectively "Governmental Defendants") as a tautological matter, Warta and PZU (collectively "Insurance Company Defendants") because they were owned and operated by the Polish government during all relevant times. As for plaintiffs, who are alleged to be citizens of the United States and residing here as of the date of the Complaint, nothing in their papers specifies when each plaintiff became a United States national. From the nature of plaintiffs' claim, though, each of them (or his or her predecessor in interest) was a Polish national at the time that the property at issue was

expropriated and the applicable policy or policies was or were allegedly breached. That being so, plaintiffs would not be "nationals of the United States" within the coverage of the Agreement Between the United States and Poland Regarding Settlement of Claims of United States Nationals (the "Treaty," 11 U.S.T. 1953).

In that respect, it is true that "nationals of the United States" is not a term expressly defined in the Treaty, nor is there caselaw on the subject. But the Annex to the Treaty provides that "claims of nationals of the United States are rights and interests in and with respect to property nationalized, appropriated or otherwise taken by Poland which, from the date of such nationalization, appropriation or other taking to the date of entry into force of this Agreement, have been continuously owned...directly by natural persons who were nationals of the United States." That use of the past tense plainly requires a claimant to establish United States citizenship at or before the time of the alleged taking, as well as continuous ownership of the subject property from the time of the taking until the Treaty's effective date of July 16, 1960. Here plaintiffs have offered no showing to trigger application of the Treaty under those criteria.

To turn now to the background of foreign sovereign immunity in this country, before 1952 all foreign sovereigns were entitled to assert absolute immunity from suit in United States courts (see *Verlinden B.V., 461 U.S. at 486).* Then the 1952 issuance of the Tate Letter[3] by the State Department announced an executive policy that would restrict immunity to suits involving the public acts of a foreign sovereign, while eliminating such immunity for commercial acts (see, e.g., *Jackson v. People's Republic of China, 794 F.2d 1490, 1493 (11th Cir. 1986)).* Nearly a quarter century later (in 1976) Congress entered the picture with the Act, which both (1) codified and clarified that restrictive theory of sovereign immunity and (2) granted subject matter jurisdiction and personal jurisdiction to United States courts over lawsuits and

states, respectively, that fall within certain exceptions to sovereign immunity.

This Court's August 24, 1999 memorandum opinion and order ("Opinion") held generally, for the reasons most recently expressed by the Court of Appeals for the District of Columbia, that the Act conferred subject matter jurisdiction over claims arising before 1952. But the Opinion deferred decision as to the applicability of any of the exceptions to sovereign immunity set out in the Act. This opinion now addresses those exceptions.

Lack of Subject Matter Jurisdiction

Foreign countries enjoy a presumption of immunity in United States courts (see, e.g., *28 U.S.C. § § 1330*(a) and (b); *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994)).* It is also clear that the Act's exceptions provide the exclusive set of circumstances in which a foreign state will be denied such immunity.[4] And although the party seeking immunity retains the burden of persuasion throughout, once a defendant is shown to be a "foreign state" under the Act the burden of production shifts to plaintiff to prove that one of the Act's exceptions to immunity applies (see, e.g., *Byrd v. Corporacion Forestal v Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 372 (7th Cir.1985)* (per curiam)).

Here plaintiffs do not challenge defendants' "foreign state or instrumentality" status under the Act, so the burden of production rests on plaintiffs to demonstrate that defendants' claims fall within one of the immunity exceptions. In an effort to meet that burden, plaintiffs contend that subject matter jurisdiction exists pursuant to four of the Act's provisions: (1) the "subject to" exception for international agreements under Section 1604; (2) the waiver exception under Section 1605(a)(1); (3) the commercial activity exception under clause three of Section 1605(a)(2); and (4)

the international law violation exception under clause two of Section 1605(a)(3). Those contentions are dealt with in turn.

Section 1604: The Treaty

In an effort to advance economic relations between the two countries, the United States entered into the Treaty with Poland effective July 16, 1960 (11 U.S.T. 53). Poland there agreed to pay $ 40 million to the United States "in full settlement and discharge of all claims of nationals of the United States...against the Government of Poland on account of the nationalization and other taking by Poland of property and of rights and interests in and with respect to property, which occurred on or before the entry into force of this Agreement" (id. Art. I.A, emphasis added).

Both plaintiffs and defendants seek to invoke Section 1604 of the Act in an effort to benefit from application of the Treaty. That statutory provision prescribes the limit on a foreign state's immunity emphasized in the following quotation:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Because the Treaty became effective 16 years before the Act's passage, the statute must yield to any conflicting provisions or effects of the Treaty. For their part, plaintiffs claim that the Treaty created an additional "exception" to foreign sovereign immunity because it constituted Poland's waiver of immunity as to all expropriation and related claims. To the contrary, defendants say that all expropriation and

related claims of United States nationals were effectively settled by the Treaty. As the following discussion reflects, both sides' contentions miss the mark by a wide margin.

Plaintiffs' Mem. 3 asserts that Poland's entry into the Treaty somehow "waived its immunity and the immunity of defendants PZU and Warta" as to any plaintiff whose claims were not settled by the Treaty--that is, as to any claimant who either was not a United States national by the time of the taking or who did not own property in Poland continuously from the time of the taking until 1960 (Treaty Annex A). Defendants' July 23, 1999 Mem. 23 takes the reverse side of that argument, contending that the Treaty represents a "final settlement by Poland for [all] nationalized property."[5] Thus defendants urge that the Treaty bars all such claims by any United States national, no matter when the person obtained citizenship in this country.

In fact the impact of the Treaty is much less extensive--though in different ways--than either party would have it. To abrogate sovereign immunity, an international agreement must expressly state its intention to do so (*Amerada Hess, 488 U.S. at 442; Frolova, 761 F.2d at 378* and cases cited there). Hence the scope of the waiver of Polish sovereign immunity contemplated by the Treaty must be coextensive with the class of claims that were settled by the Treaty.

As stated earlier, Poland and the United States engaged in a quid pro quo exchange: Poland's payment of $ 40 million in return for settlement of the wrongful expropriation (and other related) claims of persons who were United States nationals at the time of the taking and who also owned property in Poland continuously from the time of the taking until 1960. Because plaintiffs and their predecessors were not within that category, plaintiffs' claims were not settled by the Treaty, and by the same token Poland has not, by ratifying the Treaty, waived its immunity as to plaintiffs' claims. None of the authorities cited by either party suggests a waiver of

immunity or a settlement of claims by the Treaty beyond the Treaty's clearly stated scope.[6] In sum, the Treaty is simply not relevant to this action.

Section 1605(a)(1): Waiver

Plaintiffs also contend that defendants have either expressly or impliedly waived their immunity pursuant to Section 1605(a)(1). That provision negates foreign state immunity in any case:

> in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

As with waiver defenses generally, what is required in this area is an intentional and knowing relinquishment of the legal right not to be forced to defend on foreign ground (see, e.g., *Princz v. Federal Republic of Germany, 307 U.S. App. D.C. 102, 26 F.3d 1166, 1174 (D.C. Cir. 1994)*, requiring proof of a subjective intent to waive immunity; *Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980))*. Courts have found such a relinquishment in situations where a defendant either itself or through its authorized agent[7] expressly waived immunity,[8] or failed to assert the defense of immunity in an answer or other responsive pleading,[9] or consented to arbitration in a United States forum,[10] or consented to the application of United States law,[11] or itself brought suit in or used United States courts[12] (see generally H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617).

In this instance there has been no express waiver of immunity by any defendant, either by the Treaty or

otherwise. As for the Treaty, the earlier discussion has shown its plain inapplicability to the claims asserted here. And as for any other claimed basis for a finding of waiver, plaintiffs first offer the disingenuous added argument that their attorney's telephone conversations with two consular employees (both Polish attorneys), during which those employees did not assert Poland's sovereign immunity, constituted an implied waiver of such immunity. But there is nothing to suggest that such officials had either the actual or the apparent authority to waive immunity on behalf of either the Governmental Defendants or the Insurance Company Defendants, nor can such a waiver be reasonably inferred from their orally having raised questions other than sovereign immunity. And similarly, the letter sent ex parte to this Court by the Polish Consul in Chicago before defendants' appearance in this action[13] --a letter that stated (erroneously) an error in plaintiffs' foreign service of process--cannot by any stretch of the term be deemed a "known relinquishment" of foreign sovereign immunity.

None of those actions, either individually or in combination, rises to the level of emphatic consent to the jurisdiction of the United States required by Section 1605(a)(1). As stated in *Drexel Burnham Lambert Group Inc. v. Committee of Receivers, 12 F.3d 317, 326 (2d Cir. 1993)*(citation omitted), after citing various Courts of Appeals decisions to the same effect, including Frolova from this Circuit:

> We must bear in mind that "the implied waiver provision of Section 1605(a)(1) must be construed narrowly," and that any waiver must accordingly be "unmistakable" and "unambiguous."

Those authorities teach that courts should be particularly wary of stretching the doctrine of implied consent too far.

Carried beyond its intended scope, the implied consent exception to sovereign immunity could subvert the need to establish minimum contacts with a forum.[14] Any such extension would impermissibly put foreign states in a position far worse than that of any private person in the United States courts (see, e.g., *Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 987 (N.D. Ill. 1980)).*

Section 1605(a)(2): Commercial Activity

Next plaintiffs urge that defendants' actions fall within the commercial activity exception, more specifically the third clause of Section 1605(a)(2)(emphasis added):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[15]

But the analysis that follows shows that plaintiffs have double difficulty as to the Governmental Defendants: They fail to satisfy both the "commercial activity" and "direct effect" requirements. And as to the Insurance Company

Defendants plaintiffs fail (at least) to satisfy the "direct effect" test.

(1) Commercial Activity

As used in Section 1605(a)(2), "commercial activity" is meant to distinguish activity in what in our society would view as governmental, public or sovereign enterprises (such as running police departments or parks) from acts of foreign states or their agencies or instrumentalities acting in what we would deem a commercial capacity (such as operating hotels or cruise ships). It is obvious that governmental expropriation of private property under governmental authority--whether legitimate or illegitimate--is the classic type of activity coming under the first rubric and not the second. Whatever else may be said of the Governmental Defendants' alleged conduct, it is not "commercial activity" (see *Magnus Electronics, Inc. v. Royal Bank of Canada, 620 F. Supp. 387, 389-90 (N.D. Ill. 1985)* and cases cited there). As to the Insurance Company Defendants, of course, the writing of insurance coverage is just as typically an example of private commercial activity, thus forcing consideration of the "direct effect" aspect of the statutory exception.

(2) Direct Effect[16]

In the portion of their contentions that merits the most careful consideration, plaintiffs seek to read the Act's direct effect requirement as though the economic impact on a United States party, caused by a foreign government's or its instrumentality's actions on its own soil, were itself enough to subject the foreign sovereign or instrumentality to suit here. That possible reading is scarcely one that would do violence to the English language: Damage to the pocketbook can certainly be viewed as a direct effect sustained by the victim of that damage.

But on examination such a statutory construction would prove too much: It would essentially eliminate sovereign

immunity as such, for all a United States plaintiff would then have to show would be any economic damage caused by the alleged wrongful conduct of the foreign government or instrumentality in its own territory. As this Court said in *Magnus Electronics, 620 F. Supp. at 390* (citation and footnote omitted):

> Due process constraints preclude such a broad sweep against private litigants, and it would be anomalous indeed if a foreign nation could be haled into court here on so slender a connection when a non-sovereign could not.

It is scarcely surprising, then, that several Courts of Appeals' opinions have held or indicated that financial injury suffered in the United States is insufficient of itself to meet the direct effect requirement (see the Seventh Circuit's *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 581-82 & n.9 (7th Cir. 1989)* and such opinions elsewhere as *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1237-38 (10th Cir. 1994)* and *Foremost-McKesson, Inc. v. Islamic Republic of Iran, 284 U.S. App. D.C. 333, 905 F.2d 438, 450 (D.C. Cir. 1990)*). In that respect the situation here is conceptually comparable to that in *Zedan v. Kingdom of Saudi Arabia, 270 U.S. App. D.C. 382, 849 F.2d 1511 (D.C. Cir. 1988)*, where an American citizen had moved to Saudi Arabia to work on a roadway, and at some point during the job an agency of the Saudi Arabian government took over the project and guaranteed payment of plaintiff's contract salary. When the roadway was completed plaintiff returned home to the United States, believing that his remaining pay would be forwarded to him there. It never was. *Zedan, 849 F.2d at 1515* found no direct effect in the United States:

> Appellant's injury, while financial rather than personal, was definitely suffered in Saudi Arabia, for it was there that the Ministry of Communications breached its contract with him. While it is true that the breach continued after appellant left Saudi Arabia, the breach's effect in the United States cannot be said to be direct, for this effect is due to an intervening event--appellant's return here. See *Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978)*("The common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption."), aff'd mem., *607 F.2d 494 (D.C. Cir. 1979).*

By like reasoning, plaintiffs' or their predecessors' injuries were suffered in Poland, where their properties were taken and where their insurance contracts were breached. Even though the nonrestitution of the properties and the nonpayment of insurance continued after plaintiffs (or their predecessors in interest) had moved to the United States, under the cases that did not amount to a direct effect in the United States. If anything, plaintiffs may be viewed as having an even lesser claim to such a direct effect than Zedan did, because they (unlike Zedan) were not United States citizens at the time of the original injury. And even closer to home than Zedan, see the discussion in *Princz, 26 F.3d at 1172-73* (adhering to Zedan and to other cases elsewhere standing for the same principle).

None of the cases cited at Plaintiffs' Mem. 21-22 for findings of a direct effect in the United States is analogous to plaintiffs' situation. Each of those scenarios involved a business transaction that initially transpired between a foreign sovereign or instrumentality and a business located in the United States, with either the original contract having called for payment to be made in the United States or the

foreign sovereign having sought out the American business. By contrast, here the property involved was located in Poland and the insurance contracts were formed in Poland with Polish citizens. In those circumstances, plaintiffs' present desire to be restored or repaid in the United States is irrelevant to the determination of the direct effect of defendants' actions.

That conclusion really flows a fortiori from a case such as Princz, where an American citizen sought money damages for injuries he had suffered and slave labor he had performed while a prisoner in a Nazi concentration camp. Princz, id. at 1172 found that Germany's current use of the United States' mail, wire and banking systems to administer pension and other reparation programs for victims of the Third Reich did not give rise to the required direct effect in the United States:

> Such activities, conducted years after the alleged "commercial activity" giving rise to this suit, can not be considered an "immediate consequence" of the enslavement of Mr. Princz and others. Again, there are too many intervening elements between the asserted cause and effect.

This case lacks even that attenuated (and itself inadequate) nexus, for Poland has not launched any such United-States-based activities to right the wrongs identified in the Complaint.

Hence even if the Governmental Defendants' expropriations of plaintiffs' properties had constituted "commercial activities" within the meaning of Section 1605(a)(2), neither those activities nor the Insurance Company Defendants' failure to fulfill the insurance contracts (contracts that were themselves such "commercial activities") had a "direct effect" in the United States in the statutory

sense. No defendant's actions thus fall within the commercial activity exception to sovereign immunity.

Section 1605(a)(3): International Law Violation

Finally, plaintiffs seek to ground their last predicate for subject matter jurisdiction in Section 1605(a)(3):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

But the required phrase-by-phrase and clause-by-clause parsing of that provision clearly demonstrates its inapplicability here.

It may be assumed for this purpose (without necessarily deciding) that the "rights in property" of plaintiffs and their predecessors were "taken in violation of international law" and "are in issue" here. Although the Complaint is not predicated on any Polish governmentally-perpetrated genocide that numbered any of the name plaintiffs'

antecedents among its victims, plaintiffs do allege the existence of Polish pogroms (both during and after the German-perpetrated Holocaust) that carried out the Polish government's antisemitic policies and that played an integral part in the inability of the plaintiff class members to have obtained any recompense--either in kind or money--for the totally illegal expropriation of Jewish-owned property in Poland.[17] It is unnecessary to recite the appalling details that may be found in histories of the period or in the Complaint (or, with many more individualized accounts, in the similar complaint now pending in the United States District Court for the Southern District of New York, Garb v. Republic of Poland, No. CV 99-3487) to see the presence of what have become known as "crimes against humanity" in the modern evolution of international law. And if indeed the Governmental Defendants and the Insurance Company Defendants were implicated in--or were even the beneficiaries of--those crimes, common humanity would also appear to cause them to make reparations in the same way that reparations, at long last, have come or have begun to come from the German government, from German banks and from Swiss banks.

But this Court's authority does not extend to serving as the enforcing agent for matters of conscience, or of justice in the abstract. Just this last Term a Supreme Court majority held that the equitable powers of federal courts are limited to the scope of equity jurisdiction exercised by England's High Court of Chancery at the time of adoption of the Constitution and the enactment of the Judiciary Act of 1789 (*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 144 L. Ed. 2d 319, 119 S. Ct. 1961, 1968 (1999))* --and history teaches that was an era of complete immunity of foreign sovereigns from suit in this country's courts (*Verlinden B.V., 461 U.S. at 486).*

Hence no federal court is vested with a roving commission to force any foreign government to do equity. If

any such government fails or refuses to act in its governmental capacity as conscience would command, no federal court is empowered to force it to do so except as Congress has specified. Nor can this Court's decision be driven by the assertions in plaintiffs' Surreply to Defendants' Motions To Dismiss that plaintiffs cannot obtain justice (or even a fair trial) in the Polish courts. Instead this Court remains bound by the jurisdictional limitations imposed by Congress, and this opinion returns to that task.

As for the first alternative contained in Section 1605(a)(3), it is necessary to remember that the "rights in property" that are "in issue" here are (1) Polish real estate and (2) proceeds of insurance that should have been paid for the expropriation of that real estate. But neither "that property" nor "any property exchanged for such property" is alleged to be "present in the United States"--certainly a truism as to the real estate itself, and an unsupported and unsupportable notion as to the insurance proceeds.

Nor is the second alternative in the same subsection available to save plaintiffs' claims for federal court resolution. For that purpose plaintiffs do in part satisfy the first clause of that alternative: As to the insurance proceeds but not as to the real estate itself, "that property or any property exchanged for such property," on the allegations of the Complaint, "is owned or operated by an agency or instrumentality of the foreign state"--here the Insurance Company Defendants. But nothing has been proffered to suggest that either Warta or PZU "is engaged in a commercial activity in the United States" (see *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 204 (5th Cir. 1984)*(per curiam)).[18] Once again, the only connection this case has to the United States is the plaintiffs' after-the-fact decision to move to the United States and acquire citizenship here.

In short, this last possible string to the bow of subject matter jurisdiction is broken as well. Plaintiffs have not met their burden of production on the Section 1605(a)(3) exception either.

Conclusion

Because defendants' charged actions do not come within any of the exceptions to sovereign immunity specified in the Act, this Court lacks subject matter jurisdiction over this action. Accordingly the motions to dismiss filed by all defendants--one by Poland, Treasury and PZU collectively and the other by Warta alone--are granted. This action is dismissed.[19]

Milton I. Shadur

Senior United States District Judge

Date: September 24, 1999

-Footnotes

[1] All citations to the Act take the form "Act § --," using the Title 28 numbering.

[2] Because the absence of subject matter jurisdiction is a threshold dispositive issue, this opinion does not address such other potential grounds for dismissal as statute of limitations, the local action doctrine, the Act of State doctrine or venue (see *Ruhrgas Ag v. Marathon Oil Co., 526 U.S. 574, 143 L. Ed. 2d 760, 119 S. Ct. 1563, 1570 (1999)).* It is worth noting, however, that the Act confers personal jurisdiction over foreign states to the same extent that it confers subject matter jurisdiction--that is, as to every claim that falls within one of the Act's exceptions to foreign sovereign immunity *(28 U.S.C. § 1330* and Sections 1605-1607; *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488-91, 76 L. Ed. 2d +81, 103 S. Ct. 1962 (1983)).* That being so, this case does not pose the question of priorities recently dealt with by the Supreme Court in Ruhrgas Ag.

[3] Reprinted in 26 Department of State Bull. 984-85 (1952) and in *Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976).*

[4] Section 1602; H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610; *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989).*

[5] That Memorandum was filed early in the game (in opposition to plaintiffs' motion for a temporary restraining order), but defendants advanced the same position of the Treaty's exclusivity throughout the briefing on their motions to dismiss.

[6] Nothing suggests that any plaintiff is a United States national who falls within the stated scope of the Treaty and yet failed to make a claim in the forum provided by the Treaty, the United States Foreign Claims Settlement Commission. This opinion therefore need not consider what effect the Treaty might have on such a claimant.

[7] See *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 722 F. Supp. 1032, 1038 (S.D.N.Y. 1989)*(agency law dictates that actions by agent within scope of his agency are binding on principal).

[8] See, e.g., *Sotheby's Inc. v. Garcia, 802 F. Supp. 1058, 1063 (S.D.N.Y. 1992).*

[9] See, e.g., *Corporacion Venezolana de Fomento v. Vintero Sales Corp., 477 F. Supp. 615, 619 n.9 (S.D.N.Y. 1979).*

[10] See, e.g., *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988).*

[11] See, e.g., *Eckert Int'l, Inc. v. Government of the Sovereign Democratic Republic of Fiji, 32 F.3d 77, 79-81 (4th Cir. 1994).*

[12] See, e.g., *Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 79-80 n. 18 (3d Cir. 1995)*(finding that a sovereign that brings suit in the United States subjects itself to jurisdiction over matters incident to suit, including counterclaims); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect, 89 F.3d 650, 656 (9th Cir. 1996)* (intervenor foreign-government-instrumentality refiner held to have waived part of its immunity under Act as to counterclaims based on the same transaction or occurrence on which it was bringing suit).

[13] Plaintiffs' attorney hardly aids their cause by the misleading characterization of that letter as "this answer to

the case" and as "Consul Pawlak's first written answer in this case" (Plaintiffs' Mem. 15). That is just wrong, and counsel should know better.

[14] As n.2 reflects, *28 U.S.C. § 1330* confers personal jurisdiction over states whose activities have been found to come within one of the Act's exceptions to foreign sovereign immunity.

[15] It is clear that this action, predicated as it is on the alleged expropriation of the real property of Polish nationals and on the alleged interference with and breach of insurance contracts in Poland, is not within the statute's first clause because defendants' activity was not "carried on in the United States by the foreign state." And of course the second clause of the statute is equally inapplicable because no action by defendants can be characterized as "an act performed in the United States."

[16] This section's text will omit the constant repetition of quotation marks surrounding the term "direct effect"--but that term is used throughout in its statutory sense.

[17] According to Complaint P9, in 1996 and again in 1998 the Polish government admitted its involvement through mea culpa acknowledgments by its Foreign Minister and then by its President.

[18] It will be recalled that the affirmative answer to the existence of the two insurers' "commercial activity" in the earlier section of this opinion bearing that caption was reached in the context of the Section 1605(a)(2) requirement of commercial activity elsewhere, not in the United States.

[19] This dismissal of course moots the name plaintiffs' motion for class certification.

No. 99-3823

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EDWARD HAVEN and ALLEN WELBEL,
Plaintiffs-Appellants,

v.

RZECZPOSPOLITA POLSKA, SKARB PANSTWA, State Treasury of Poland, POWSZECHNY ZAKLAD UBEZPIECZEN S.A.,
Defendants-Appellees.

Date: July 18, 2000

ORDER

Plaintiff-Appellant has filed a petition for rehearing or petition for rehearing en banc. No judge in regular active serice has requested a vote on the petition for rehearing en banc and all of the judges on the panel have voted to deny rehearing. The petition rehearing is therefore DENIED.

No. 99 C 1727

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EDWARD HAVEN, etc., et al.,
Plaintiffs,

v.

RZECZPOSPOLITA POLSKA (Republic of Poland), et al.,
Defendants.

AFFIDAVIT

Introduction

I, STANLEY J. GLOD, hereby assert that I am making this affidavit freely and voluntarily, as a participating attorney of the class action committee herein, and as an expert. I am in no way acting as a party to this lawsuit.

I further aver that I am currently an active member in good standing of the bars of the District of Columbia, Virginia, New York, and the Supreme Court of the United States.

During the period of August 1988 through November. 1992, I served as Chairman and chief judge of the Foreign claims Settlement Commission of the United States (hereinafter referred to as the FCSC). In the course of my tenure, I participated in the adjudication of hundreds of cases involving the expropriation of the property of private U.S. citizens, corporations, and U.S. Government property which had been unlawfully taken or destroyed by unfriendly foreign governments or regimes without compensation to the rightful

owners. These cases involved expropriations that had been committed by Egypt, Iran, the German Democratic Republic (the former Hast Germany), and Iraq during the Gulf War in 1990-1991. Issues arose periodically involving Poland, specifically the U.S. Poland Claims Settlement of 1960 (referred to as the "Treaty"), and expropriations alleged to have been committed by Poland following World War II. These will be referred to in greater detail later in this affidavit.

For the court's information, during the period of 1971 through 1998, and excepting the period of federal service mentioned above, I represented several Polish Consulates in Washington, D.C., New York, Chicago and Los Angeles. This representation involved a variety of legal issues, civil and criminal, but primarily dealt with representing the Consulates in their mission of protecting the rights of Polish nationals who became heirs, beneficiaries, or legatees in various estate cases filed in U.S. probate courts. The underlying legal authority for this practice was a treaty known as the Consular Convention Between Poland and the United Slates, T.I.A. S. 7642, dated 1972, Additional references will be made to this practice later in this affidavit.

Being a native born American of Polish parents, a veteran of service in the United States Army, and totally fluent in the Polish and other Slavic languages, I have been active in the affairs of the Polish — American community since my years as a university undergraduate. In this regard, during 1983-1985, I served as president of the National Advocates Society, a nationwide association of American attorneys of Polish heritage.

From 1994 through 1998, I served as a national vice president of the Polish American Congress, an umbrella organization based in Chicago that serves over 13 million Americans of Polish descent. In addition to these duties, I

was appointed to the board of directors of the Polish American Jewish American Coordination council, a body created jointly by the Polish-American community and the. American Jewish Committee in order to promote a greater understanding and open dialogue on issues of importance to the two communities.

My travels to, and relationship with, Poland over the last twenty eight years have been regular and varied: as a legal practitioner, U S. Government official, and ethnic community leader, Since September, 1998, 1 have been residing in Warsaw, Poland as an American legal expert on international expropriation/restitution claims issues, as well as a consultant on matters relating to Poland's newly gained membership in the NATO Alliance. My duties entail a thorough knowledge of local Polish economic and political conditions, as well as the nation's strategic planning for the future both as a partner in NATO, and a prospective member of the European Union (EU).

In view of my current residence in Poland, I apologize to the court for not being able to furnish precise citations for the various references to laws, claims programs, cases, etc. Most materials to which I would normally have access in the United States are not currently in my possession. In some instances, I must, therefore, rely on my best recollection. However, to the extent that the court may wish, I offer to supply such citations of authorities as may be necessary, as soon as I can upon a return visit to the United States.

1. Mission and Functions of the FCSC

The FCSC was created by Congress in 1954 in order to:

a. Provide a convenient, specialized and unique forum and remedy

b. for the adjudication of claims

c. brought by large numbers of claima nts, who,

d. were citizens of the U.S. S at the time of the unlawful acts,

e. against, a foreign sovereignty

f for illegal destruction, taking, or expropriation of such citizens' property

g. without compensation to said owners.

It is not recalled that the intent of Congress, as expressed in the legislative history of the enabling legislation, was to either usurp, minimize, or affect the powers of the federal courts, or to otherwise create an omnibus exclusive jurisdiction in a given quasi-judicial agency. Rather, it was intended as an alternate tool in the arsenal of the chief executive, working in coordination with the Congress, to provide a convenient forum with which to settle claims of citizens against an errant foreign sovereign for the unlawful taking or destruction of private property. In a very definite sense, it also became a tool of foreign policy, where the resolution of long standing disputes was in the best interests of the citizen claimants as well as the U.S. This was certainly true in the case of the 1960 Treaty v ith Poland, ("to advance economic relations between the two countries"), as it was for a number of other countries in central and eastern Europe following World War II, with which similar treaties were concluded.

The concept of non-exclusivity was best illustrated more recently in 1991-1992 during the structuring of an agreement

with the German Government for claims that arose the former East Germany, In that instance, sole and exclusive jurisdiction was not vested in the FCSC, but rather provided for an "opting-out" mechanism which claimants were free to pursue. In this case, claimants had to carefully weigh their options to either receive compensation by sharing in a lump sum "claims pot," administered by the FCSC, or to pursue private legal remedies against the German Government, where the recovery could be much greater, including a possible return of the property in kind, This decision making process involved careful due diligence on the part. of claimants, who had to determine the exact current status of the property in question, viz,, does it exist, its present physical condition, value in the market place, difficulties in restoring the property to a. habitable state, etc. Needless to say, what to many appeared initially as a bonanza, in reality became a nightmare, or was entirely non-existent, in such cases, the option to stay within the FCSC compensation program became the better choice.

2. The 1960 Treaty with Poland

During my tenure at the FCSC., it became painfully obvious that the Treaty of 1960 turned in to a sword, rather than provide justice for claimants. Not only did the so called "settlement" result in a return of virtually pennies on each dollar of valuation to the relatively small number of fortunate claimants who were able to qualify and flied claims, but in many cases closed the door to any justice for countless others. In my opinion, a large number of justifiable claims were denied for a variety of reasons: failure or insufficiency of evidence, laches (even though the time for filing was extended to March, 1962). In a definite sense, this could well be referred to as the "catch 22 Settlement" Considering the scope of the claims, the time for filing was considered by many as being too short. Additionally, the gathering of evidence by claimants during the height of the

Cold War became an insurmountable task, at best, involving: areas where borders had shifted considerably, where witnesses were either deceased or difficult to locate, where property and vital statistics records were either destroyed or unavailable, frustrations with mail delivery and failure of communications, travel restrictions, and more. Even with the promised "cooperation" of Polish authorities to assist in these tasks, perform discover, provide pre-war property valuations, etc., taken together with what is now known, causes any serious student of international law to question the good faith of Poland in negotiating the agreement it only tends to lend credibility to the. statement of Plaintiff's counsel, who characterized the "Treaty" in his Memorandum of Law in Opposition to the Motion to Dismiss, as a "windfall profit" for what appears to be a very low annual premium, paid over a period of twenty years, in return for the benefit and protection of American law against any and all possible future actions.

3. Expropriations by Poland Following World War II

With the transformation of Poland to democracy in 1989, large numbers of potential claimants who either were, or were not U.S. citizens at the time of the unlawful taking of their properties by Poland following World War II contacted the FCSC on a daily basis. Since the Commission could not assist them at the time due to a lack of an existing claims program, they turned to representatives of the Polish Government at the Polish Embassy in Washington, where. they were consistently advised by consular and legal officials that they could always retain counse' in Poland to pursue their claims in the Polish courts in accordance with Polish law. They were also advised that, eventually, Poland would pass re-privatization laws that would ease the entire process. Finally, ten years Eater in September, 1999. and reportedly prompted by the litigation of the case at issue, a draft property restitution bill was introduced, providing for

compensation to tbrnier owners of up to 50% of the value of their property through "privatization coupons." An association of pre-war property owners criticized the proposal as being unjust and unacceptable.

Interestingly, the primary architect at the bHI, deput.y treasury minister, Krzystof Laszkiewicz, reiterated the government's determination to solve the property issues, by stating that: "All Eastern European countries have already settled the re-privatization issue. Poland also needs to do it. A few years ago it would have been a lot easier to implement the re-privatization process." See Annex A. In an interview with the Polish Press Agency (PAP) on April 7, 1991, in my capacity as Chair of the FCSC, I basically echoed the. same opinion, stating that the claims were legitimate, and. that it was in Poland's best interest to solve these matters swiftly. See Annex B. A commentary in the Warsaw Business Journal, dated September 13-14, 1.999, confirmed these views by stating that, "If the issue had been dealt with in 1990, when property values and expectations were far lower, restitution would have been much less of a problem." See Annex C.

Attempts by counsel for the Defendant now strain to use the Treaty of 1960 as both a shield against further actions by Plaintiff claimants, and a sword to deny them their day in court in the instant case, Defendant's counsel even has the audacity to state that, should the court rule for the Plaintiffs, such judgment would not be enforced in Poland, This boldly flies In the face of a comment by the Prime Minister's spokesman, Krzystof Luft, who stated that "Poland will recognize the eventual ruling in this case." (See Annex D).

*** "Property restitution is the top priority for the government at the moment" (See Annex E). These desperate attempts by defendants' counsel, in the face of the expressed wishes of Poland's duly elected, sworn leaders and

representatives to right previous wrongs, appears not only to be ill timed, but incredulous.

All of this aside, the ugly specter and exhibited tendencies of anti-Semitism were evident in the historical events known as the Kielce Pogrom of 1946, These tendencies, now formally admitted by Polish governmental and Church authorities, continued after the 1960 Treaty, with known incidents of property expropriation occurring as late as 1969-1970. Legal theories notwithstanding, these events actually encourage the argument that any legal protections accorded by the Treaty were actually vitiated by a post facto pattern and repetition of conduct that largely created the problems in the first place. The fact that elements of Polish society are even now predisposed to express their anti-Semitic biases is even more disturbing. See Annex F.

4. Representation Consulates

As mentioned in the Introduction, I had been engaged over the years in a legal practice involving several Polish Consulates in the United States. This practice primarily involved the representation of the Consulates in the protection of the rights of Polish national heirs, beneficiaries and legatees, in estate cases filed in probate courts in the US. The primary legal authority relied upon in the disposition of these cases was the Consular Convention between Poland and the US., T.I.A.S. 7642, dated 1972. In all such cases within my experience, the specific consul, or Polish attorney assigned/acting in that capacity, at all times held himself/herself out as representing the Government of Poland. By extension, one could well assume that such consuls in reality do represent and speak for the Government of Poland in all matters relating to legal issues.

5. State of the Polish Judiciary and Legal System

As also previously mentioned, in December, 1991, your affluent was privileged to serve as the first official representative of the American Bar Association's Central and East European Law Initiative (CEELI) program to visit Poland and compile an orientation as to the state and progress of reforms in public institutions, Law, the judiciary, administrative tribunals, and bar organizations. This project was undertaken with the express approval of the Attorney General of the United States, and resulted in the compilation of the first known handbook on institutional reform in Poland.

In the course of conducting personal interviews with the chief justice of Poland's highest court, a number of associate justices, as well as judges in Poland's highest administrative tribunal, it became apparent from their comments that the judiciary in Poland was not entirely independent of outside influences. Some were allowed to remain as members of parliament, and legislate on matters in which they would later sit in judgment. As mentioned by the judges themselves, low wages would often force them to conduct an outside practice of law, or some other form of associated, semi-professional ventures, It would often occur in my experience that a "judge" would produce business cards showing him/her as a member of parliament, a private practitioner, consultant, etc. In this sense, my findings, which coincidentally bear the same date line of 1991, are entirety consistent with the comments by Professor Andrzej Rzeplinski, whose authoritative work is cited in Plaintiffs Sur Reply to Defendants' Motion to Dismiss, at pages 1-2. The issue of compensation to foreigners was debated during every session of the Polish Parliament during the past ten years by members who held the dual status of both judge and parliamentarian. Although Poland has made great progress in correcting these imbalances in the independence of their jurists, nonetheless it is fair to state that many are still substantially influenced by past policies and practices

sufficient in nature as to raise serious doubts as to the possibility for a fair and impartial decision of Plaintiffs' case.

The issue of legal reform is of enormous importance to Poland at this stage in its development. Reform lies at the very essence of Poland's future in any number of international' institutions. In the words of Horst Kahler, president of the European Bank for Reconstruction and Development (EBRD), "Transition countries (such as Poland) must improve their legal environments and demonstrate sustained political commitment to the rule of law if democracy and prosperity are to be secured for future generations." Emmanuel Maurice, the general counsel of the EBRD added that, "To be credible, legal institutions must have adequate independence and authority, and the resources to effectively enforce the law." See Annex G. Concerns for greater progress by Poland in this area have been surfaced repeatedly by institutions such as the EBRD and the European Union (EU), Frankly, Poland has no choice but to comply expediently if her membership in these organizations is to meet with approval in the near future.

6. Commercial Activity Exception Under 28 USC 1605

In addition to the Polish entities already mentioned as doing business in the United States (WARTA, PZU, and LOT), a number of other Polish firms are both directly and indirectly involved in such commercial' activity. Many of these no doubt are inexorably intertwined with the defendants, WARTA and PZU due to the scope of the latter's business.

The same holds true for American firms doing business in Poland. The American Chamber of Commerce in Poland, established in 1991, boasts a membership of 320 American firms, which undoubtedly utilize the services and products of WARTA, PZU, and countless other Polish firms.

As a matter of semantics, when referring to Polish firms, it must be added that most of those mentioned in this discussion are either entirely or partially state owned, The following list is not exhaustive by any means, but certainly illustrates the point:

PEKAO — bank and trading company (See Annex H)

ORBIS hotels and travel services: offices in NY

Polish Ocean Lines — maritime transportation and port services

Cepelia- giftware, china, crystal typical of the Polish culture: outlets in NY & IL -

AGROS food and spirits products

ELEKTRJM — industrial conglomerate which solicits U.S. investors, and recently acquired Bresnan Telecommunications Poland, a US owned telecom and cable TV firm.

MELEX golf cart manufacturer, previously headquarters in North Carolina

PZL Mielec — manufacturer of crop dusting and fire fighting aircraft (North Carolina sales and distribution location) See Annex I.

Unitronex — electronics, instruments; sales location in Des Planes, IL For decades, many of these firms were headquarters at. 500 Fifth Avenue, New York. NY. Whether that remains a viable current address is unknown,

7. Polish Media Coverage of the Instant Case

The Polish media has essentially tied the Illinois and New York cases together, leaving an impression with the reader that they are joint matters for decision in the U.S. federal court system. See Annexes J,K and L. Annex M. is an account in the Polish language press. No attempts have been made to distinguish these cases, again leaving an impression that the cases contain material that is offensive to the modern Polish nation. This form of coverage would raise serious doubts as to the ability to obtain a fair trial in Poland.

Finally, your affiant is hopeful that the contents of this affidavit will assist the court in its deliberations. If further information or clarification is necessary, affiant is ready to assist in any way possible. Likewise, your affiant has made every attempt to render an objective and unbiased account of events, facts, cases, recollections and reflections resulting from the many years of experience with Poland, the Polish people, and the Polish American community.

September 24, 1999

Respectfully Submitted,

THE REPUBLIC OF POLAND
CITY
EMBASSY OF THE UNITED SS
STATES OF AMERICA

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Subscribed and sworn to before me, a consular officer of the United States, this 24th day of September 1999, in Warsaw, Poland,

Barbara L. Armstrong
Consul

Chicago, July 7, 1999

The Honorable Milton I. Shadur
United States District Court
Northern District of Illinois
Eastern Division
219 S. Dearborn St.
Room 2303
Chicago, IL 60604

Re: Case Number 99c1727

Dear judge Shadur:

In response to the notice to Defendants, sent by Attorney for Plaintiffs - Mr. Eric V. Puchala, the Ministry of Justice of the Republic of Poland expresses the position that the documents have not been served in accord with International Treaty. Article 3 of the Hague Convention on the Service of Judicial Documents in Civil or Commercial Matters, states;

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalization or other equivalent formality.

The attorney for Plaintiffs is not the person entitled to forward documents, according to the above quoted Convention

Additionally, the Ministry of Justice was not delivered the court's summons to appear in court in response to the complaint

Sincerely,

cc.
1 .Enibassy of the Republic of Poland
in Washington
2. Foreign Affairs Ministry in Warsaw

28 USCS § 1605

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*** CURRENT THROUGH P.L. 106-272, APPROVED 9/22/00 ***
*** WITH THE EXCEPTION OF P.L. 106-271 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

28 USCS § 1605 (2000)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

22 USCS § 1623

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*** CURRENT THROUGH P.L. 106-272, APPROVED 9/22/00 ***
*** WITH THE EXCEPTION OF P.L. 106-271 ***

TITLE 22. FOREIGN RELATIONS AND INTERCOURSE
CHAPTER 21. SETTLEMENT OF INTERNATIONAL CLAIMS
GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

22 USCS § 1623 (2000)

§ 1623. Claims

(a) Jurisdiction of Commission; bases for determination; fair market value.

(1) The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States--

(A) included within the terms of the Yugoslav Claims Agreement of 1948;

(B) included within the terms of any claims agreement concluded on or after March 10, 1954, between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof; or

(C) included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

(2) In the decision of claims under this title [22 USCS §§ 1621 et seq.], the Commission shall apply the following in the following order:

(A) The provisions of the applicable claims agreement as provided in this subsection.

(B) The applicable principles of international law, justice, and equity. In determining the value of a claim under international law, the Commission shall award the fair market value of the property as of the time of the taking by the foreign government involved (without regard to any action or event that occurs after the taking), except that the value of the claim shall not reflect any diminution in value attributable to actions which are carried out, or threats of action which are made, by the foreign government with respect to the property before the taking. Fair market value shall be ascertained in accordance with the method most appropriate to the property taken and equitable to the claimant, including--

(i) market value of outstanding equity securities;

(ii) replacement value;

(iii) going-concern value (which includes consideration of an enterprise's profitability); and

(iv) book value.

In the case of any claim for losses in a service industry, the appropriate basis of valuation shall be presumed to be that referred to in clause (iii). For purposes of the preceding sentence, the term "service" means economic activity the output of which is other than tangible goods.